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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1904

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, and UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, LOCAL 618,
Petitioners,

v.

NORANDA ALUMINUM, INC.,
Respondent.

RESPONDENT'S BRIEF

In Opposition to Petition for Writ of Certiorari and Motion for Award of Damages for Delay

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QUESTION PRESENTED

Petitioners' Brief, through disregard of parts of the opinions below and misstatement of the nature of the legal issue or issues involved, does not properly set out the single question[1] for which review is sought. This question is whether the

[1] Petitioners maintain that this case involves Rule 52(a) which is set out at Appendix F of the Petition (Petition, page 2). Although neither Rule 52(a) nor any asserted inadequacy in the particularity

Findings of Fact of the trial court, sitting without a jury, that the illegal jurisdictional strike engaged in by Petitioners caused Respondent injuries in 6 particulars totaling $914,823.54 were clearly erroneous. The Court of Appeals decided the findings were not clearly erroneous and that the trial court correctly applied the law to the facts as found.

INTRODUCTION

This matter involves a question that does not warrant the Court's attention. As this Brief will show, the sum and substance of the Petition is a request, framed in terms of a so-called apportionment issue, that this Court review fact findings on damages arrived at by the trial court after 8 days of hearing and consideration of extensive evidence. The only basis for the request is Petitioners' dissatisfaction with the method of computing damages, the accuracy of the computations and the evidentiary support for the method and measure of damages assessment by the trial court. Since apportionment is required only where more than one "cause" exists and both the trial court and Court of Appeals found only one cause—the illegal conduct of Petitioners —existed, arguments concerning "apportionment" are no more than an effort to disguise fact quarrels under the cover of a legal issue that does not exist. Review of fact disputes, no matter how framed, is not the function of a writ of certiorari.

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of the trial court's Findings of Fact were raised before the Court of Appeals until the filing of a Petition for Rehearing more than 30 days after the Opinion of the Court of Appeals issued, review of the Petition here demonstrates that Petitioners restate in the argument concerning Rule 52(a) (Petition, pages 23-27) the same contentions set out in the argument concerning compensatory damages (Petition, pages 13-23). The impropriety of such restatement aside, it should suffice here to note that the Findings of Fact of the trial court were specific and particular enough to provide Petitioners with the material for devoting 52 pages of a 101-page Brief to the damages questions in the Court of Appeals.

STATEMENT OF FACTS AND THE CASE

The statement of Petitioners (Petition, pages 3-13) was prepared without regard to applicable principles of review which require that the evidence be viewed and construed favorably to the prevailing party below and that all reasonable inferences of which the evidence is fairly capable should be drawn in support of, and not against, the judgment given below. Petitioners refer only to selected parts of the Findings both in the statement of facts as well as in the description of the proceedings below. The version of facts at pages 5-10 of the Petition is directly at variance with and collides in all important respects with the actual Findings, in particular the Findings of the trial court concerning the effect of Petitioners' illegal strike, the impact of that strike and the number of construction days and man hours lost as a result of the strike's effect and impact. Therefore, in the interest of brevity and accuracy, Respondent adopts here as its Statement of Facts the complete Findings made by the trial court and sustained by the Court of Appeals which are found in the Appendix to the Petition, pages 5a to 10a and 13a to 22a. The Findings of particular significance to the question or questions sought to be raised here are Nos. 16 to 22, inclusive.

With regard to the Opinion of the Court of Appeals, and Petitioners' disregard of it, certain matters are of significance. First, the Court of Appeals, as was the case with the trial court, did not deal with or discuss an 11-work-day strike which the Petition asserts as fact is the length of the illegal strike involved (e.g., Petition, pages 5, 7 and 10); on the contrary, the Court of Appeals discussed damages properly attributable to "the 14-day work stoppage here" (Petition, page 5a). Secondly, the Court of Appeals reviewed the labor inefficiencies and 3-day Laborers' strike which are the substance of Petitioners' complaint here (Petition, pages 8-10), along with the effect of Petitioners' illegal strike, only in discussing the 5-month delay which Respondent suffered in getting to full pro-

duction on a 174 "pot" basis. Petitioners' excision of parts of the Opinion of the Court of Appeals and quotation of other parts in an effort to disguise what the Court of Appeals was dealing with (e.g., Petition, page 13) is made evident by a simple reading of the entirety of the language from which Petitioners select part. Thus, and based specifically on the findings of the trial court that Respondent was forced to and accepted start-up on a modified 88 "pot" basis only after the effect of Petitioners' illegal strike was determined and solely as a result of that strike alone (Findings, numbers 18 and 19, Petition, page 20a), the Court of Appeals concluded as follows with regard to the strike-caused change to a modified start-up (and not as set out in a misleading half-citation at page 13 of the Petition) as follows:

> "The Unions' major criticism centers on Noranda's reliance upon *Kaiser's CPM method of computation* which *predicted January 23, 1971, as first metal date. In fact it was not reached until February 25, 1971.* But the Unions overlook entirely the fact that *this date was only first metal date on a modified basis of 88 pots*, barely 50 per cent of the original projection. In calculating the damages the court accepted this date which only permitted a 33-day *delay time* when in fact it *would have been much longer for the entire 176 pots called for in the specifications. Indeed, 'total metal date' was not made until mid-June, 1971, almost five months later than originally projected. Perhaps*[2] *some of this delay was occasioned by inefficient labor and certainly some was ocasioned by the*

[2] Petitioners begin "quotation" of the Opinion of the Court of Appeals at this point, omitting what precedes in the same paragraph (Petition, page 13) and arguing that the Court of Appeals referred to the modified start-up delay in discussing the possible effects of labor inefficiencies and the 3-day Laborers' strike (Petition, pages 12 to 13, 16, 18, 26 to 27, n. 20, pages 26-27). The full paragraph set out above shows, as does the sentence preceding Petitioners' selected quote, that the Court of Appeals' reference to "some of this delay" was solely to the 5-month delay to mid-June.

3-day laborers' strike, but the point is that the trial judge chose February 25, 1971, as the cut-off date, when only 88 pots were completed. If he had chosen the mid-June date, when all pots were completed, perhaps the items that the Unions now complain about, as well as some others, would have some weight in the final calculations. We believe, however, that the course pursued was certainly a most reasonable and fair approximation. Indeed, *if a later date had been chosen, making allowance for the expedition afforded the 88-pot project, and if the trial judge would have meticulously calculated the percentages as the Unions suggest, we dare say the damages would have totalled a much higher figure.* We, therefore, conclude that the overall method of calculating the damages was eminently just and fair to the Unions and that the total amount allowed was a reasonable approximation of the amount suffered by Noranda." (Petition, pages 9a-10a, emphasis added).[3]

That the Court of Appeals, in the portion of its decision cited by Petitioners (Petition, page 13) was discussing the longer 5-month delay period until mid-June, 1971 when all "pots" were complete, and not the 33-day delay to modified start-up with 88 "pots" on February 25, 1971 which the trial court found was solely a result of the Petitioners' illicit activity, is clear.[4]

[3] As Petitioners note (Petition, page 7, n. 7) the reference to "176 pots" is an inadvertent error in the opinion.

[4] The evidence showed that during the period following termination of Petitioners' illegal strike through "first metal", costs as a result of labor inefficiencies and related construction trades' "practices" increased by $13,500,000 although Petitioners' illegal strike was the last to occur on the project (A. 353-355, E. 746 and 760). Taking the portion of these costs which Petitioners contended and now claim should be the "fraction" of project overrun for which they are responsible ("35.5%"—Petition, page 5), and using the "meticulous calculation of percentages" suggested by Petitioners, damages would total $4,792,500 attributable to Petitioners' misconduct. That misconduct, as found by both the trial court and the Court of Appeals, was "not in the best tradition of the trades" (Petition, page 10a).

The legal principle which governs decision here has been well established by this Court for many years, especially since the seminal cases of *Story Parchment Paper Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555 (1931) and *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946). This principle, that measurement of damages by "just and reasonable approximation" is sufficient, has been uniformly applied by the Courts of Appeals in § 303 damage actions like the case at bar (*United Mine Workers v. Patton*, 211 F.2d 742 (4th Cir.), cert. denied, 348 U.S. 824 (1954); *Vulcan Materials Co. v. United Steelworkers of America*, 430 F.2d 446 (5th Cir. 1970), cert. denied, 401 U.S. 963 (1971); *Riverside Coal Company v. United Mine Workers of America*, 410 F.2d 267 (6th Cir.), cert. denied, 396 U.S. 846 (1969)) and is the basis of the findings of the trial court on damages (e.g., Conclusions of Law, number 9, Petition, page 25a) and the Court of Appeals' affirmance of those damage findings (Petition, pages 9a-10a).

Petitioners seek review of this case because of a supposed need to make an apportionment of damages in compliance with this Court's settled determination that only compensatory damages are to be provided in Section 303 and other such suits for violation of federal law where legal injury is of an economic character. Although there is no question that this Court's established principles demand apportionment among "causes", the facts summarily set out below show that there is no need here to define the precise scope of the apportionment doctrine for the plain reason that the principles of apportionment are not applicable here. In particular, apportionment is appropriate only where damages are a result of more than one "cause"[5]—as the record conclusively shows in this case, the

[5] Petitioners cite at length quotations and examples concerning the doctrine of apportionment from Prosser, Torts (4th Ed. 1971) (Petition pages 15 to 17, 21); similar "maxims", identified by Petitioners as "the black letter law" (e.g., Petition, page 21, n. 16), are repeated at length from Restatement (Second) of Torts (e.g., Petition, pages 17-18 and n. 11, 21 and n. 16). Although such recitations are of substantial academic interest and may or may not be relevant to exposition of the "black letter law", the facts are that such lengthy dissertations are taken from Prosser's and the Restatement's "rules" concerning joint tortfeasors (e.g., Prosser, Torts, 4th Ed. 1971). Petitioners neglect to mention and seek to conveniently omit from consideration not only the preceding portions of Prosser and the Restatement which deal with "causation" and the fact that the principle of apportionment "rests upon" a determination that one or more "causes" may be charged with a single result (Prosser, Torts, (4th Ed. 1971), 241) but also the entire record here—thus, wholly aside from the fact that the opinions below found only petitioners' illegal conduct caused the damages here, the courts below specifically found that neither the 3-day Laborers' strike nor labor inefficiencies were "causes". These fact determinations, unless clearly erroneous, cannot be overturned and are of no concern to the Supreme Court. Thus, as Prosser, Torts (4th Ed. 1971), makes clear, l.c. 237:

> "Causation is a fact."
>
> ". . . [C]onduct is not a cause of the event, if the event would have occurred without it." (Id., 239).

sole "cause" for the damages awarded by the trial court and confirmed by the Court of Appeals was the illicit conduct of Petitioners.

In arriving at that part of the $13½ million cost increase in the period August, 1970—February, 1971 attributable to Petitioners' illegal strike, the only construction interruption during that period (A. 352-355), Respondent used a task force of professionals to determine damages. The fact, measure and amount of these damage items (E. 107; A. 481-482), and the 33-day delay underlying a number of them, were arrived at by a detailed study conducted by this task force of experts and specialists (A. 197-198, 202-203, 205-206, 208-210, 354-357, 360-361, 403, 431-434, 452-453). The members of the task force, with more than 138 combined years' extensive and detailed experience in construction, engineering, cost control and construction accounting (A. 157-160, 162-166, 175-176, 350-353, 403, 431-434, 436-437, 452-453), either testified or were present in the court room and their testimony was stipulated to as corroborative.

Each of the damage items arrived at by the task force, and those based on the task force's 33-day delay calculation, were corroborated and confirmed at trial by Respondent and its independent certified public accountant experienced in smelter auditing, construction accounting and the aluminum industry (A. 478-482, 494, 519-531). Although all books, records and documents upon which the damage items were based were provided Petitioners during discovery, *Petitioners introduced no evidence at trial with respect to the fact, cause or measure of any of the damage items now sought to be questioned here.*

The unrebutted evidence in the trial court showed that, as of July 30, 1970, "first metal" on the full 174 pot basis originally scheduled would have been reached January 23, 1971 taking into account all the work interruptions preceding Petitioners' July 30 strike and picketing and taking into consideration the substandard level of labor productivity on the part of all construction crafts (A. 360-361, 362-365, 386-392, 461, 513-514). The analysis and appraisal of the strike's impact on schedule, and critical areas in particular, demonstrated that if the 15,411 man days lost during the period of the strike and picketing and the remobilization and reorganization following it were not put back into construction activities at overtime in the period following the strike, "first metal" on the original 174 pot basis could not have been reached until October, 1971 and would not have been reached until March 31, 1971 on the modified 88 pot "first metal" basis dealt with by the trial court (A. 376-377, 392). The unquestioned evidence before the trial court illustrated that:

> But for the Petitioners' strike and picketing, "first metal" on the full original plan basis of 174 pots would have occurred on January 23, 1971 based on construction progress and productivity as of July 30, 1970 (A. 388-389, 391, 513-515);

> But for the Petitioners' strike and picketing, "first metal" would not have been modified to 88 pots using purchased anodes (A. 179-180, 388-392);
>
> But for the Petitioners' strike and picketing, "spot" and "scheduled" overtime to work 15,411 man days lost would not have been required (A. 356-357, 368, 375, 381, 386-387, 451-452, 463-465);
>
> Spot and scheduled overtime to put back in the hours lost as a result of the Petitioners' strike and picketing were necessary to limit the effect and impact of the strike on "first metal" (A. 376-377);
>
> But for the use of this overtime program, Petitioners' strike would have delayed "first metal" on the original basis in effect July 30 from January 23, 1971 to October, 1971 (A. 376-377, 392);
>
> But for the overtime program, the Petitioners' strike and picketing would have delayed "first metal" on the modified 88 pot basis from February 25, 1971 to March 31, 1971 (A. 392);
>
> And, even with modification of "first metal" to the changed 88 pot basis described above, and use of an overtime program to work manhours lost, only the Petitioners' strike and picketing delayed "first metal" from January 23, 1971 to February 25, 1971 or 33 calendar days (A. 210, 375-376, 390-392, 400, 402, 439, 444-445, 447-448, 450-451, 452-453, 463).

Summarizing the evidence presented, the trial court concluded that Respondent had "shown to a certainty" that it sustained damages "by reason of the illegal strike and picketing" of the Petitioners (Conclusions of Law, number 9, Petition, page 25a) and that the "applicable measure of damages" so suffered is that of "just and reasonable approximation" (Conclusions of

Law, number 9, Petition, page 25a). Insofar as the trial court's determination with respect to the first factor—causation—is concerned that problem is a fact question only[6] and the trial court resolved the question in accordance with overwhelming judicial authority holding:

> ". . . [I]t is enough that he [the plaintiff] introduces evidence from which reasonable men may conclude that it is more probable that the event was caused by the defendant than that it was not. The fact of causation is incapable of mathematical proof, since no man can say with absolute certainty what would have occurred if the defendant had acted otherwise."[7]

Similarly, in deciding the damages aspect of this case once the factual issue of causation was resolved, the trial court applied and found in accordance with settled authority[8] that:

> ". . . [W]hile the damages may not be determined by mere speculation or guess, it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the result be only approximate."[9]

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[6] Prosser, Torts (4th Ed. 1971), 236-249; Restatement (Second) of Torts, §§ 431, 433.

[7] Prosser, note 6 *supra*, at 242.

[8] *Iodice v. Calabrese*, 512 F.2d 383 (2d Cir. 1975); *United Mine Workers v. Patton*, 211 F.2d 742 (4th Cir.), cert. denied, 348 U.S. 824 (1954); *Vulcan Materials Co. v. United Steelworkers of America*; 430 F.2d 446 (5th Cir. 1970), cert. denied, 401 U.S. 963 (1971); *Sheet Metal Workers, Local 223 v. Atlas Sheet Metal Co.*, 384 F.2d 101 (5th Cir. 1967); *United Mine Workers of America v. Osborne Mining Co.*, 279 F.2d 716 (6th Cir.), cert. denied, 364 U.S. 881 (1960); *Metropolitan Paving Co. v. International Union of Operating Engineers*, 439 F.2d 300 (10th Cir.), cert. denied, 404 U.S. 829 (1971).

[9] *Story Parchment Paper Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931).

> "Damages are difficult to ascertain with exactness in this type of case [Section 303] . . . [I]t would seem to place an impossible burden on the plaintiff to require him to prove damages with mathematical precision. As the court said in *Sheet Metal Workers v. Atlas Sheet Metal Co.* . . . 'it is sufficient if the evidence supports a just and reasonable approximation.' "[10]

In affirming the trial court's fact determinations on the issues of causation and damages, the Court of Appeals provided no more than this Court has uniformly required in cases where injuries of an economic nature are caused by violation of federal law,[11] e.g., "damages directly and proximately caused by wrongful conduct chargeable to the defendants as defined by the traditional law of torts."[12] In thus affirming and concluding under the applicable standard of review that the trial court's fact determinations and application of the law to those facts were not clearly erroneous (Petition, pages 8a-10a), the Court of Appeals gave meaning to what was well stated in another context as follows:

> "After all the technical statistical jargon . . . as well as the less esoteric numbers and percentages were placed before the trial judge, it was his job to resolve the issues."[13]

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[10] *Mason-Rust v. Laborers Local* 42, 306 F.Supp. 934, 939 (E.D. Mo. 1969), affirmed, 435 F.2d 939 (8th Cir. 1970).

[11] *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-419 (1975); *Teamsters Local 20 v. Morton*, 377 U.S. 252, 260-261 (1964).

[12] *United Mine Workers v. Gibbs*, 383 U.S. 715, 730 (1966).

[13] *Chance v. Board of Examiners*, 458 F.2d 1167, 1173 (2d Cir. 1972).

PETITIONERS' AUTHORITIES DISTINGUISHED

The Petition here is directed to that which the trial court (Petition, page 25a) and the Court of Appeals (Petition, pages 9a to 10a) determined the law does not require—"meticulous calculation of percentages." Petitioners demand "mathematical precision" not only in connection with the assessment of damages but also, as analysis reveals, with regard to the strictly factual questions of causation. The latter questions, moreover, are the essence of the Petition since it is well established that the legal issues of whether and to what extent damages can be apportioned among "causes" do not and cannot arise until it is shown that more than one "cause" exists.[14] The courts below, on an extensive and detailed record to which Petitioners presented nothing contra, found that only Petitioners' illegal strike and picketing caused the injury and damages assessed insofar as the 33-day delay in arriving at "first metal" and its attendant consequences are concerned—the 3-day Laborers' strike and the lack of productivity of all construction crafts, among which conditions Petitioners maintain damages ought to have been but were not apportioned (Petition, pages 8 to 10, 13 to 23, 26 to 27 and n. 20, pages 26 to 27), were simply not found to be "causes" vis-a-vis the injury and damages with which this matter is concerned.

Assuming that Petitioners suffer that "confusion" which the often-cited Prosser (Petition, pages 16 to 21) attributes to those who, as here, attempt to deal with the problem of apportionment in terms of causation,[15] the fact remains that the entirety of Petitioners' argument concerning the legal issues and intricacies of apportionment together with the decisions and treatises cited in support of that argument (Petition, pages 13 to 23) are neither

[14] Prosser, Torts (4th Ed. 1971) at 248-252, 289-290, 313.

[15] Prosser, supra note 14, at 248-252, 289-290, 313.

applicable nor relevant. That argument and those decisions and treatise references to Petitioners' recitations of "black letter law" (Petition, page 21, n. 16) simply have nothing to do with and are not involved in a matter like the present case where only one "cause"—the illicit activity of Petitioners—is involved. The 3-day Laborers' strike, which the record showed was the kind of brief interruption of construction activity that could be and was contained by reallocation of manpower to critical work items without any effect upon the first metal date scheduled prior to Petitioners' illicit strike (A. 242-243, 365-366, 387-389, 404-406, 460-462), although an antecedent "condition", was found not to be a "cause" of the injury with which this case is concerned. The inefficiency and lack of productivity of all construction tradesmen, which the unrebutted evidence showed was, like the 3-day Laborers' strike, taken into account and considered in determining the effect of Petitioners' wrongful strike and picketing (A. 360-361, 363-365, 404-406) was not only a condition antecedent but, to the extent that productivity declined further and inefficiency increased following Petitioners' illegal strike, part of the damages flowing from that misconduct (A. 239-242, 409-411, 429-431, 451-452, 461, 465).

Petitioners' argument concerning "apprortionment" (Petition, pages 13 to 23) rests upon Petitioners' misstatement of the 3-day Laborers' strike (Petition, page 10) and labor inefficiency (Petition, pages 8 to 10) as "causes" of the first metal delay involved in this case—since neither of these factors are "causes" or were found to be "causes" by the courts below, Petitioners' effort to convert an attack on the trial court's fact findings into an asserted question of law must fail.[16] Petitioners not only dis-

[16] Insofar as Petitioners object to the quality of the evidence provided by Respondent in the trial court (Petition, pages 5 to 7), and notwithstanding the misrepresentations set out in those objections, it is sufficient to note that these complaints go to fact determinations of the kind with which this Court is not concerned. In addition, Petitioners neglect to mention that in addition to the

regard the settled principle that one who engages in misconduct takes existing circumstances as they are, but also the plain fact that the only question here is the trial court's proximate cause determination—a determination that the Court of Appeals properly found should be affirmed under applicable standards of review.

> "It were infinite for the law to judge the cause of causes, and their impulsion of one another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree."[17]

The demand for "mathematical precision" in the determination of causation and assessment of damages that is the basis of Petitioners' inapplicable "apportionment" argument is repeated, with equal lack of relevance, in that part of the Petition dealing with the "specificity requirements" of Rule 52(a) of the Federal Rules of Civil Procedure (Petition, pages 23 to 27). Insofar as such a complaint can be raised for the first time following issuance of an appellate court opinion,[18] summary analysis of Petitioners' argument and inapposite citations illustrates no cause for "complaint" exists. First, the trial court's detailed Findings of Fact (Petition, pages 13a-22a) set out that factual basis for each of its Conclusions of Law (Petition, pages 22a-25a) which is the settled "requirement" of Rule 52(a). *Hatahley v. United States*, 351 173 (1956); *Kelley v. Everglades*

CPM program upon which construction delay factors were based in the trial court, Respondent demonstrated by exhibits (E. 102-104, 141-387, 462-705, 734-766) and testimony (A. 160-163, 173-174, 183-184, 190-193, 196-198 214-218, 240-242, 358-359, 365-366, 404-407, 432-433, 457-458, 461-462) that the illegal jurisdictional strike of Petitioners caused the damages established here with certainty. No evidence of any nature was introduced by Petitioners in this regard, although ample opportunity was provided.

[17] Bacon, *Maxims of the Law*, Reg. I as quoted in Prosser, Torts (4th Ed. 1971), note 63 at 244.

[18] See note 1 *supra*.

Drainage District, 319 U.S. 415 (1943). "Exacting detail", called for by Petitioners with respect to items to which Petitioners presented "detailed challenge"—but no evidence whatsoever —in the trial court (Petition, pages 23 to 24, n. 20, pages 26 to 27), is not the purpose of Rule 52(a) and has never been a "requirement" of that Rule.[19] Secondly, Rule 52(a) does not "require" and has never been held to demand—in § 303 or any other type of damage action—anything other than the kind of separate statement of the amount of damages for each item found compensable contained in the trial court's Findings (No. 21, Petition, pages 20a to 22a).[20] Petitioners' contrary argument that the decision of the Court of Appeals here creates a "special rule" and conflicts with two inapposite decisions of the Ninth Circuit Court of Appeals in which "lump sum" damage awards were found inadequate (*Plumbers & Fitters, Local 761 v. Matt J. Zaich Const. Co.; Carpenters Local 1273 v. Hill*—Petition, pages 25-26)[21] is easily disposed of by the language of the Court of Appeals affirming the trial court's damage findings. Thus, the Court below concluded (Petition, page 9a):

> "While it is true that the trial court did not spell out in meticulous detail each item of damage, he did clearly find

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[19] *United States v. Merz*, 376 U.S. 192 (1964); *Lemelson v. Kellogg Co.*, 440 F.2d 986 (2d Cir. 1971); *O'Neill v. United States*, 411 F.2d 139 (3d Cir. 1969); *Pritchett v. United States*, 425 F.2d 663 (5th Cir. 1970); *Life Savers Corp. v. Curtiss Candy Co.*, 182 F.2d 4 (7th Cir. 1950); *United States v. Birnbach*, 400 F.2d 378 (8th Cir. 1968); *Swanson v. Levy*, 509 F.2d 859 (9th Cir. 1975).

[20] *Hatahley v. United States*, 351 U.S. 173 (1956); *Neill v. Diamond M. Drilling Co.*, 426 F.2d 487 (5th Cir. 1970); *Zatina v. Greyhound Lines, Inc.*, 442 F.2d 238 (8th Cir. 1971).

[21] *Plumbers & Fitters, Local 761 v. Matt J. Zaich Const. Co.*, 418 F.2d 1054, 1059 (9th Cir. 1969) and *Carpenters Local 1273 v. Hill*, 398 F.2d 360, 362 (9th Cir. 1968) are in accord with the settled, but inapplicable, rule that "remand for further findings under Rule 52(a) is necessary only when an appellate court cannot adequately review the 'lump sum' award in light of the objections raised" (*Neill v. Diamond M. Drilling Co., supra* note 20 at 491-492).

> that each item was caused by the illegal strike and that each was a just and reasonable approximation of the actual amount of the damages. The cases on claims of this type require no more. *Vulcan Materials Co. v. United Steel Workers of America*, 430 F.2d 446, 457-58 (5th Cir. 1970), cert. denied, 401 U.S. 963 (1971)."[22]

Finally, Petitioners totally disregard the meaning and intent of the very "rule" whose "requirements" the Petition argues should be observed. Contrary to the settled principle that findings of the trial court are not to be disturbed unless "clearly erroneous",[23] Petitioners reassert in this part of the argument the identical fact issue quarrels complained of under the "apportionment" part of the Petition (e.g., Petition, pages 23-24, n. 20, pages 26-27). Such argument is totally misplaced as reference to the Opinion of the Court of Appeals (Petition, pages 9a to 10a) and the following provision of Rule 52(a) illustrates:

> ". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." (Appendix F; Petition, page 28a).

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[22] Petitioners' contention that the Court of Appeals erred in citing *Vulcan Materials Co. v. United Steel Workers of America* because the Fifth Circuit "nowhere discussed" sufficiency of findings is untrue as reference to the pages of the *Vulcan Materials Co.* decision cited by the Court of Appeals here demonstrates.

[23] *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424 (1975); *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948); *Vulcan Materials Co. v. United Steelworkers of America*, 430 F.2d 446, 458 (5th Cir. 1970), cert. denied, 401 U.S. 963 (1971).

CONCLUSION

It is respectfully submitted that Petitioners have totally failed to approach, much less sustain, the burden of establishing under Rule 19 of the Rules of this Court that there are special and important reasons why the Writ should be granted. The decision below did not involve important questions of federal law which have not been, but should be, settled by this Court; nor has the Court of Appeals decided any federal question in a manner that conflicts with applicable decisions of this Court or of another Court of Appeals on the same matters. The Court of Appeals correctly held that the Findings of Fact and Conclusions of Law of the trial court were not clearly erroneous.

MOTION FOR AWARD OF DAMAGES FOR DELAY

Respondent, upon its brief in opposition to the granting of the petition for writ of certiorari filed herein, moves the Court for an award of reasonable damages pursuant to Rule 56(4) of the Rules of this Court, if the petition for writ of certiorari be denied, upon the basis that it is manifest that there was no ground for granting such a writ.

Respectfully submitted,

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